

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FLOYD LOWE,

Petitioner,

No. CIV S-02-0882 LKK GGH P

vs.

A. K. SCRIBNER, Warden, et al.,

Respondent.

ORDER

_____/

Petitioner, a state prisoner proceeding with counsel, timely filed a notice of appeal of this court's August 29, 2006, denial of his application for a writ of habeas corpus. Before petitioner can appeal this decision, a certificate of appealability must issue.¹ 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The certificate of appealability must “indicate which specific issue or issues satisfy” the requirement. 28 U.S.C. § 2253(c)(3).


¹ Although counsel’s notice of appeal was timely filed, counsel did not file a request for certificate of appealability until this court required counsel to set forth the specific grounds of the appeal. See Order, filed on January 24, 2007, following Ninth Circuit’s limited remand, filed in this court on January 16, 2007.

1 A certificate of appealability should be granted for any issue that petitioner can
2 demonstrate is “debatable among jurists of reason,” could be resolved differently by a different
3 court, or is “adequate to deserve encouragement to proceed further.” Jennings v. Woodford,
4 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).²

5 Petitioner has made a substantial showing of the denial of a constitutional right in
6 the following issues presented in the instant petition: 1) Does petitioner’s conviction for felon in
7 possession of a firearm violate due process because it is based on a jury verdict after a trial found
8 by the state court to have been infected by substantial constitutional error as to all other verdicts
9 rendered at that trial? 2) If petitioner’s due process rights were thereby violated, was appellate
10 counsel’s failure to raise that issue on appeal ineffective assistance of counsel? 3) Does
11 petitioner’s life sentence for the status offense of felon in possession of a firearm violate the
12 Eighth Amendment’s protection against cruel and unusual punishment or the Fourteenth
13 Amendment’s protection of due process?

14 Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is
15 issued in the present action.

16 DATED: March 6, 2007.

17
18 
19 LAWRENCE K. KARLTON
20 SENIOR JUDGE
21 UNITED STATES DISTRICT COURT
22
23
24

25 ² Except for the requirement that appealable issues be specifically identified, the standard
26 for issuance of a certificate of appealability is the same as the standard that applied to issuance of
a certificate of probable cause. Jennings, at 1010.